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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 104

ADAH ALBERTY, trading as ALBERTY'S FOOD PRODUCTS, ALBERTY'S FOOD LABORATORIES, THE ALBERTY FOOD LABORATORIES, CHENO LABORATORIES, CHENO PRODUCTS and U. S. OKEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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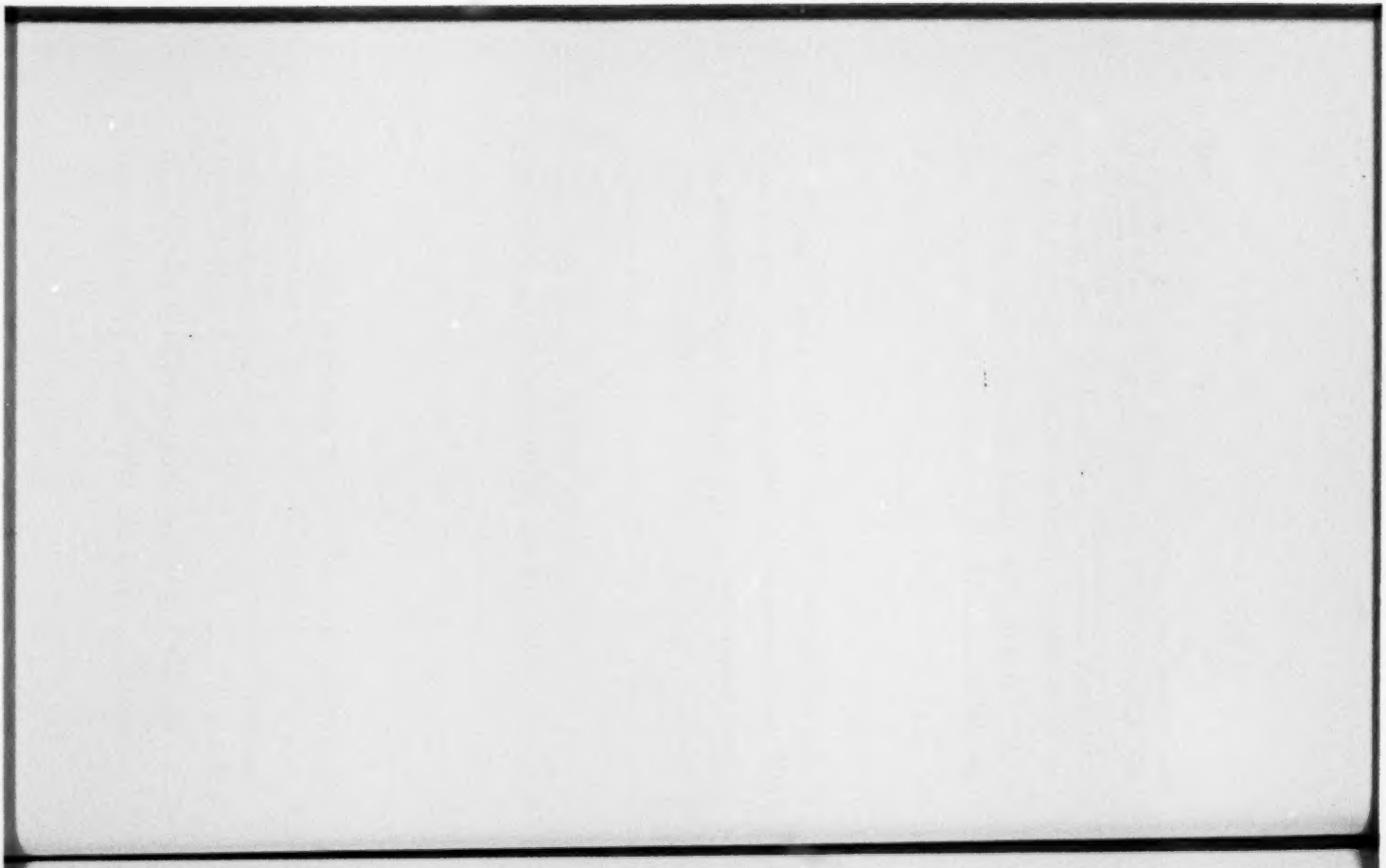

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Adah Alberty, petitioner herein, respectfully prays that this Honorable Court issue a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case on March 26, 1941 [R. 912-918]. This decree affirms a cease and desist order of the Federal Trade Commission of June 26, 1939 [R. 35-41].

Opinion Below.

The opinion of the Circuit Court of Appeal for the Ninth Circuit [R. 906-909], with the concurring opinion of one of the Justices thereof [R. 909-911] is reported in 118 Fed. (2d) 669.

Jurisdiction.

The decree of the United States Circuit Court of Appeals for the Ninth Circuit in this case was entered on March 26, 1941 [R. 912-918].

A petition for rehearing was filed within the time allowed by the rules of the Ninth Circuit and denied on April 21, 1941 [R. 919].

The jurisdiction of this Honorable Court rests on Section 240(a) of the Judicial Code of the United States (28 U. S. C. A. par. 347-a) and Section 2 of the Act of Congress of February 13, 1925, as amended, 43 Stats. 939 (28 U. S. C. A. par 348), under which cases in the Circuit Court of Appeals under Sec. 5 of "An Act to create a Federal Trade Commission, etc.," (38 Stat. 719; 15 U. S. C. A. §45) are included among the cases to which Section 240 of the Judicial Code applies.

Questions Presented.

1. In a proceeding to determine the alleged falsity and misleading character of advertising claims concerning the therapeutic value of foods, medicines and combinations of drugs, claimed to be compounded according to the teachings of the homeopathic school of medicine, may the Federal Trade Commission under its power to resolve conflicts in testimony, disregard or reject outright the unanimous testimony of experts adhering to the homeopathic school where there is a direct conflict between the teachings of the homeopathic school and the allopathic school of medicine and base its decision exclusively on the testimony of allopaths, thus making an arbitrary choice between two existing schools of healing?

It is claimed by petitioner that where different schools of medical thought exist, and where the factual truth of neither can be scientifically demonstrated, the correctness of the claims of one school should not be determined by the opinion of the adherents of the other school who are hostile to the first.

2. If, in passing on the claims of adherents to the homeopathic school of medication, the Commission relies solely on the testimony of adherents to the allopathic school does it not thereby nullify the policy of the Congress of the United States which gives express statutory recognition to the existence of a homeopathic theory of medication?

3. May the commission, in a proceeding to establish the truth or falsity of advertising claims, permit its own investigator to testify with the aid of "confidential" reports and memoranda without submitting the same to opposing counsel for inspection?

4. If certain expert witnesses of petitioner, adhering to the allopathic school, testified to the results of tests scientifically performed and stated that the tests demonstrated scientifically that Alberty's Food Instant and Alberty's Food Regular make milk more easily digestible, and if the Commission's witnesses who had no experience with those products stated that "there is no reason to believe" that they had therapeutic value and rendered milk more digestible, does the Commission under this state of the testimony have the power to reject the facts demonstrated by the experiments and adopt the opinion of its own expert witnesses unfamiliar with the products?

Statement.

Petitioner is engaged in the sale and distribution of health products, several of which are claimed to be compounded according to the homeopathic school of thought [R. 161, 162]. All of them are claimed to have certain therapeutic value.

These claims are advertised to the public through booklets, labels and other means, by which case histories are stated, and in which the alleged therapeutic properties of the products are set forth.

The Commission's complaint and notice [R. 2-13] attacked the various claims made by petitioner. After issue was joined, several hearings were had. Petitioner stipulated at the outset that certain claims were misleading and consented to their discontinuance [R. 142-160]. There finally resulted a modified cease and desist order on June 26, 1939 [R. 35-41]. This order, as well as the decree of the Circuit Court of Appeals affirming it [R. 912-918], not only prohibit specific claims theretofore made by petitioner, or claims similar to it, but also prohibit the making of any claims that either the products in question or any other preparations composed of "the same or similar ingredients", have any therapeutic value [R. 914-916].

During the course of the hearings adherents of two distinct schools of medical thought testified—allopathic physicians and homeopathic physicians. Between the testimony of the allopaths produced by petitioner and the allo-

paths called by the Commission, there is, in most instances, a sharp conflict.

However, the Commission did not produce experts from the homeopathic school of medicine, whereas all of the experts from that school which were called by petitioner unanimously testified that the preparations in question had therapeutic properties. Appendix A hereto contains a tabulation of the testimony on those parts of the order and decree to which petitioner took exception in the Circuit Court of Appeals.

In the course of the proceedings, and in order to impeach one of petitioner's witnesses, the Commission called its investigator who refreshed his memory by referring to his previous memorandum report to the Commission. This report was termed confidential, and although petitioner requested the privilege to inspect the memorandum, the Commission refused an inspection thereof on the ground that it was "confidential" [R. 416-419].

The Commission produced witnesses who had had no experience with Alberty's Food Regular and Alberty's Food Instant, and who had never used it. They stated that "they had no reason to believe" it had no therapeutic value and did not render milk more easily digestible [R. 316-317].

Petitioner on the other hand had some 200 experiments performed by experts in the laboratories of the University of Southern California, the results of their experiments, as well as a detailed description of the

manner in which they were performed, appears in the record [R. 577-599; 659-694], and establishes that the effect of the products on the digestion of milk is noticeable.

This statement, we believe, is sufficient to apprise this Honorable Court of the nature of the questions, a review of which we are earnestly seeking.

Specifications of Error.

It is claimed that the decree of the Circuit Court [R. 912-918] of Appeals as amplified by its opinion [R. 905-911] is erroneous in the following particulars:

First: In rejecting the contention of petitioner that the Commission has no power under the guise of passing upon conflicting claims of fact to make a choice between medical opinion by rejecting outright the testimony of experts adhering to the homeopathic school of medicine, and by accepting instead the opinions of the allopathic school;

Second: In holding that the Commission has the power to deny petitioner access to confidential reports to the Commission, if the same are used during the proceedings before the Commission for the purpose of refreshing the memory of the Commission's witnesses.

Third: In holding that the Commission has the power to accept the opinion evidence of its own experts in preference to facts established by scientific tests conducted by the experts of the opposite party.

Reasons for Granting the Writ.

I.

The decision of the United States Circuit Court of Appeals is in conflict with the opinion of this Honorable Court in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90.

In that case the Postmaster General issued an order denying appellants the use of the mails, for the reason that he deemed their claims of healing fraudulent. Appellants believed that healing could be effected by the exercise of the faculties of the brain and mind, and were attempting to teach others in their art by sending instructions and advertising of their method through the mails. It was said in the opinion of this Honorable Court:

> "Unless the question can be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping delivery of mail matter. . . . We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in those claims, and yet their effectiveness is but a matter of opinion in any court."

II.

The decision is in conflict with the opinion of this Honorable Court in *Seven Cases v. United States*, 239 U. S. 510, 60 L. Ed. 411.

In this case certain medicines were condemned for being falsely and fraudulently misbranded. While upholding the seizure and the statute under which it was made, the Court points out that the realm of "honest differences of opinion" was expressly left untouched by the statute.

The Federal Trade Commission Act does not employ the terms "false and fraudulent"; but its references to "unfair" or "deceptive" (15 U. S. C. A., Sec. 45a) are, although broader, of similar import.

III.

The decision is in conflict with the policy of the Congress of the United States as expressed in the amendment to the Federal Trade Commission Act of March 21, 1938, Chapter 49, par. 4; 52 Stats. 114 (U. S. C. A. 15, par. 55-c) and the Federal Food, Drug and Cosmetics Act, U. S. C. A. Title 21, par. 321-g. These statutes provide that the term "drug" means, among other things,

> "articles recognized in the . . . official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them".

These acts of Congress indicate a policy that articles may be claimed to be drugs, and may be claimed to have the properties of drugs if they are listed in the official reference works referred to. If the Federal Trade Commission is permitted to find that articles listed in those reference works do not have the properties referred to therein, or any other therapeutic properties the intent of Congress is nullified.

IV.

The decision, as far as it upholds the use of confidential memoranda by a witness of the Commission without submitting the memoranda to an inspection of opposite coun-

sel for cross-examination is in conflict with the policy of this Honorable Court that administrative bodies submit to the opposite party all evidence and documents which conceivably influence their decision, unless considerations of policy demand that the Government's sources of information remain secret. See:

Morgan v. U. S., 304 U. S. 18, 82 L. Ed. 1129;

U. S. v. Abilene, etc. Rd. Co., 265 U. S. 274, 68 L. Ed. 1016;

B. & O. R. Co. v. U. S., 264 U. S. 258, 68 L. Ed. 667.

V.

If there exists a limitation upon the power of the Federal Trade Commission to choose between conflicting opinions of different schools of medicine not subject to objective demonstration as facts, it is only apparent by analogy with the cases listed under reasons (I) and (II) above. There is, therefore, presented the novel and important question whether considerations of administrative policy require that such an unusual power should, or can validly be, lodged with the Federal Trade Commission.

VI.

The decision of the United States Circuit Court of Appeals touches the interests of all persons manufacturing, advertising and distributing medicines compounded according to homeopathic principles. Since the decree in a sweeping prohibition proscribes the making of any therapeutic

claims with respect to any medicines "similarly compounded", and since certain products so condemned contain multiple ingredients, the implications of the decision are of consequence to numerous persons other than petitioner. This is especially so because petitioner is informed that a resolution has been prepared by the Committee on the Pharmacopoeia of the American Institute of Homeopathy recommending the recognition of compounds of drugs in homeopathic dosages, whereas the decree and opinion in question, by prohibiting therapeutic claims with respect to any preparations "similarly compounded", will tend to make ineffective the apparent object of Congress to leave such matters to be worked out by the respective professional bodies (15 U. S. C. A. sec. 45d).

VII.

The power of the Commission under the express terms of the statute is to resolve conflicts "as to the facts" (15 U. S. C. A. par. 45).

While petitioner concedes that facts must often be established by opinion evidence, an opinion concerning a fact is of no evidentiary force when compared with an objective demonstration of such fact, and not sufficiently substantial to permit the Commission to prefer the opinion and to reject the objectively established fact.

Conclusion.

For the reasons stated it is believed that a decision by this Honorable Court herein will be in the public interest, in that it will create greater certainty with respect to the powers of the Federal Trade Commission in the field of conflicting medical opinion. It will also show whether, and to what extent, the Federal Trade Commission may render ineffectual the policy of Congress to recognize the homeopathic theory of medication as gathered from the Federal Trade Commission Act under which the agency operates. It will also determine whether administrative bodies may make use of confidential reports but withhold them from private persons.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

W. I. GILBERT, JR.,
CHARLES KARR,
Attorneys for Petitioner.

APPENDIX "A".

Table of petitioner's products condemned by Commission as therapeutically inactive, as to which petitioner claims the Commission could not arbitrarily reject the testimony of the homeopathic physicians or the results of scientific tests.

PREPARATION	Transcript Reference to Commission's Order	Transcript Reference to Testimony of Allopathic Physicians		Transcript Reference to Petitioner's Testimony of Homeopathic physicians.
		Testimony for Commission	Testimony for Petitioner	
Alberty's Food			582, 585	735
Regular	36	316, 841 853	597, 598 681, 770	
Alberty's Food Instant (new)	36	817		736
Alberty's Laxative Blend (German Herb Lax-Tonic)	37	321, 823	771, 787	740–742
Alberty's Phosphate	37	320, 818	696, 705	737, 792
Pellets (Nerve Food Pellets)			771	803, 807
Alberty's No. 3	37	321, 322	608, 708	745
Tablets (Alberty's Spleen and Iron Tablets)		829	709, 772	
Cheno Combination	37	321, 833	619, 629	747
Tablets (Restorex			712, 713	
Cheno Tablets)			772	
Cheno Herb Tea	37	825		
Diabetic	38	837	773	749

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Administrative Tribunals Should Not Undertake to Make an Arbitrary Choice Between Two Recognized and Existing Theories of Therapeutics and Determine as a Matter of Fact That the Claims of One School Are Erroneous by Rejecting the Unanimous Testimony of Adherents of That School and Adopting the Testimony of Adherents of a School Hostile to It.

(a) This Honorable Court, by way of analogy, has held that unless a question can be reduced to one of fact, as distinguished from mere opinion, an administrative

tribunal should not make a choice between the validity of opinions.

American School of Magnetic Healing v. J. N. McAnnulty, 187 U. S. 94, 47 L. Ed. 90.

The facts were briefly these: Appellants pretended to heal diseases and ailments by the exercise of faculties of the brain and mind. They were teaching others their art, and advertising their accomplishments through the mail. After a hearing the Postmaster General denied these people the use of the mail for the reason that their claims were deemed by him to be fraudulent. The Circuit Court of Appeals sustained the government's contention, but this Honorable Court said (47 L. Ed. p. 95):

> "Unless the question can be reduced to one of fact as distinguished from mere opinion we think these statutes cannot be invoked for the purposes of stopping the delivery of mail matter. * * * How far these claims are borne out by actual experience may be a matter of opinion. * * * One person may believe it of far greater efficacy than another but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater than even a majority of intelligent people might be willing to admit or believe. Even intelligent people may and do differ among themselves as to the extent of this mental effect. * * * How can anyone lay down the limit and say beyond that they are fraud and false pretenses? His claim of the ability to cure may be vastly greater than most men would be willing to admit and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. * * *

> We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in those claims, and yet their effectiveness is but a matter of opinion in any court."
>
> *Seven Cases v. United States of America,* 239 U. S. 510, 60 L. Ed. 411.

In this case the United States filed libels to condemn certain drugs under the provisions of the Pure Food and Drug law. Extravagant statements concerning their curative effect appeared on the containers. The power of Congress to enact such a law was attacked on various constitutional grounds, and also upon the ground that the statute entered the domain of speculation. Disposing of that claim the court stated (60 L. Ed. 416):

> "Finally, the statute is attacked upon the ground that it enters the domain of speculation (American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), and by virtue of consequent uncertainty operates as a deprivation of liberty, and property without due process of law, in violation of the 5th Amendment of the Constitution, and does not permit of the laying of a definite charge as required by the 6th Amendment. We think that this objection proceeds upon a misconstruction of the provision. *Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners.* Cong. Rec. 62 Cong. 2d Sess., vol. 48, part 12, Appx. p. 675. It was, plainly, to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with